STATE OF MICHIGAN

COURT OF APPEALS

MARCI SKONIECZNY, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED October 25, 2005
v	No. 260682 Macomb Circuit Court
DONALD R. SKONIECZNY, Defendant-Appellant/Cross-Appellee.	LC No. 2003-001081-DM

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right the award of sole physical and legal custody of the parties' minor child to plaintiff. Defendant contends the trial court erred in its determination that an established custodial environment did not exist and that the trial court's evaluation of five of the best interest factors was against the great weight of the evidence. Defendant further contends that the trial court erred in the inclusion of premarital trust assets in the calculation of support and in awarding attorney fees to plaintiff. On cross-appeal plaintiff contends the trial court erred in determining plaintiff's trust assets were separate, premarital property not subject to distribution, and in failing to award her the full amount of attorney fees incurred in the custody litigation. Plaintiff further requests an award of appellate attorney fees. We affirm in part, reverse and remand in part, and deny plaintiff's request for an award of appellate attorney fees.

Defendant argues the trial court erred in its determination that an established custodial environment did not exist and awarding sole legal and physical custody of the minor child to plaintiff. There are three different standards of review for use and application in child custody proceedings. A trial court's interpretation or application of existing law is reviewed by this Court for clear error. *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001). This Court reviews findings of fact by the trial court under the great weight of the evidence standard. *Id.* A trial court's factual findings will be sustained unless "the evidence clearly preponderates in the opposite direction." *Id.* at 5. Discretionary rulings by the trial court, such as the determination on the issue of custody, are reviewed by this Court for an abuse of discretion. *Id.*

Determining the existence of an established custodial environment is a question of fact for the trial court. *Hayes v Hayes*, 209 Mich App 385, 387-388; 532 NW2d 190 (1995). It is well recognized that "[a]n established custodial environment can exist in more than one home." *Jack v Jack*, 239 Mich App 668, 671; 610 NW2d 231 (2000), quoting *Duperon v Duperon*, 175

Mich App 77, 80; 437 NW2d 318 (1989). Although the parties retained joint physical custody of the minor child during the litigation, that prior order and custody arrangement is not dispositive in the determination of the existence of an established custodial environment. This Court has previously opined that an underlying custody order is "irrelevant" in the determination of whether a custodial environment exists. *Hayes, supra* at 388. It is recognized that the principal concern is not "the reasons behind the custodial environment, but . . . the existence of such an environment." *Treutle v Treutle*, 197 Mich App 690, 693; 495 NW2d 836 (1992).

This Court has previously determined that a trial court has erred by failing to find an established custodial environment to exist with both parents. *Foskett, supra* at 8. In *Foskett*, the trial court determined that an established custodial environment did not exist, despite its recognition that the children involved looked to both parents equally for guidance, discipline and support. *Id.* at 7-8. Consequently, when an established custodial environment is found to exist, any change in custody may only occur if the party bearing the burden presents clear and convincing evidence that the change serves the best interests of the child. *Id.* at 6.

The trial court indicated that an established custodial environment did not exist. It appears that the trial court has confused the factual ascertainment of an established custodial environment with the ultimate determination of what custody arrangement is in the child's best interest. The determinations must be made independently, and the existence of an established custodial environment impacts the decision regarding custody with regard to the standard of proof to be applied if a change of custody is determined to be in the minor child's best interest.

While the trial court is correct that the award of custody in a prior order does not dictate a factual determination regarding the existence of an established custodial environment, the mere assertion that because a divorce was pending and the custody order was temporary, is not sufficient, in and of itself, to determine that a custodial environment did not exist. Although a court may properly consider the transitory nature of a temporary custody order and the upheaval involved in custody changes that occur prior to a final judgment, the trial court failed to cite any evidence that the minor child experienced such upheaval or uncertainty because of the litigation. *Hayes, supra* at 388, citing *Bowers v Bowers*, 198 Mich App 320, 326; 497 NW2d 602 (1993). While uncertainty existed for plaintiff and defendant regarding the final custody determination, "the focus is on the circumstances surrounding the care of the children in the time preceding trial." *Hayes, supra* at 388.

The evidence preponderated in the favor of determining the existence of an established custodial environment with both parents. From the time of the child's birth, until approximately seven months of age, the minor child resided with both parents who provided for her care. Even when plaintiff returned to work, both parties shared caretaking responsibilities, despite their disputes regarding the quality of care provided. Even after plaintiff moved out of the marital home, the parties shared caretaking responsibilities for the minor child with defendant providing care primarily during the day while plaintiff was working and plaintiff providing care in the evenings and most weekends. Based on the evidence elicited, the trial court erred in determining that no established custodial environment existed. The trial court improperly focused, for this specific issue, upon the problems with communication and compatibility between the parties rather than addressing the actual physical and psychological environment in place with both parents for the child. The evidence, testimony and psychological evaluations asserting that the child was happy, developing and emotionally attached to both parents, serves to demonstrate that

the minor child looked to both parents for guidance, discipline, the necessities of life and parental comfort. We find that the trial court's erroneous factual findings pertaining to the existence of an established custodial environment resulted in a custody decision being made without applying the appropriate evidentiary standard.

The trial court addressed the issue of joint custody. In accordance with MCL 722.62a(1), when there exist "custody disputes between parents, the parents shall be advised of joint custody." Joint custody is defined as meaning "an order that specifies either that 'the child shall reside alternately for specific periods with each of the parents,' or that 'the parents shall share decision-making authority as to the important decisions affecting the welfare of the child,' or both." *Wellman v Wellman*, 203 Mich App 277, 279; 512 NW2d 68 (1994), quoting MCL 722.26a(7). In determining whether joint custody is appropriate, a trial court is required to consider the best interests of the child and whether "the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.62a(1); *Mixon v Mixon*, 237 Mich App 159, 163; 602 NW2d 406 (1999). Such basic decisions have been deemed to include health care, education, religion and issues pertaining to daily decision-making and discipline. *Fisher v Fisher*, 118 Mich App 227, 232; 324 NW2d 582 (1982). "If two equally capable parents whose marriage relationship has irreconcilably broken down are unable to cooperate and to agree generally concerning important decisions affecting the welfare of their children, the court has no alternative but to determine which parent shall have sole custody of the children." *Id.* at 233; see also *Wellman, supra* at 279-280.

The trial court determined that the parties were uncooperative and could not agree on matters impacting the welfare of the child. Evidence at trial demonstrated that the relationship between the parties was acrimonious and vengeful. Plaintiff and defendant disagreed about treatment and food options for the minor child, they refused to communicate to resolve basic conflicts, they argued about clothing and manner of dress for their daughter, were selfish regarding their time with her and did not agree regarding which school district the minor child would ultimately attend. However, as discussed above a joint custodial environment had been established. Because a joint custodial environment was established, on remand, the circuit court must determine whether the parties inability to agree on important matters regarding the child constitutes clear and convincing evidence that the joint custodial arrangement should be discontinued. In making this determination, the circuit court should focus on disputes regarding matters relating to the welfare of the child, rather than the general disharmony between the parties, and whether a termination of the joint custodial environment, rather than a change in the parenting schedule, is in the child's best interests.

Defendant also contends that the trial court's findings on best interest factors MCL 722.23(c), (d), (g), (j) and (l), were against the great weight of the evidence. However, it is unnecessary to address this issue, as the circuit court must reevaluate the best interest factors in determining whether there is clear and convincing evidence that termination of the joint custodial environment, rather than a change in the parenting schedule, is in the child's best interests.

Defendant next contends the trial court's calculation of child support was in error because it was based on a factual misunderstanding regarding defendant's employment status and included inherited trust income, resulting in the improper imputation of income. Whether the funds in dispute constitute income for purposes of determining child support is a question of law

subject to de novo review by this Court. *Atchison v Atchison*, 256 Mich App 531, 534-535; 644 NW2d 249 (2003).

The Michigan Child Support Formula expressly designates trust fund payments as constituting "income" for purposes of determining a noncustodial parent's child support obligation. 2003 MCSF 2.01(F)(14). Specifically, a former panel of this Court has opined:

> When the noncustodial parent has the financial means to support and maintain his own children, the source thereof is immaterial. While the duty imposed on the parent must be fair and not confiscatory, the parent's duty to support his children is not limited to his income. In determining the amount of support, in addition to income, all relevant aspects of the financial status of the person obligated to pay support must be considered. [*Malnar v Malnar*, 156 Mich App 534, 538; 401 NW2d 892 (1986).]

Defendant routinely made withdrawals from his trust over a three-year period. Despite defendant's assertion that these payments constituted "loans" and not "income," defendant was lacking in information regarding the existence of any written confirmation that the payments were loans, interest applied, schedule and rate of repayment and had failed to demonstrate any effort to repay the funds received. Although defendant asserted that he was only the beneficiary of the trust and that another individual served as the trustee, defendant presented no evidence that any requests made for withdrawal of funds were ever denied or required any express or explicit justification for release of the payment. In addition, defendant acknowledged that his inability to control the trust assets was, at this time, because the express provisions of the trust would not permit him to serve as trustee if he were involved in a divorce or, if married, a prenuptial agreement was not in place. Defendant explicitly acknowledged that a portion of the monies received from the trust were expended to meet daily familial obligations.

The trial court based its determination to include trust assets in the calculation of defendant's income based on the historical access and use of the funds by defendant. Because there were draws on the inheritance to meet familial obligations, even though the draws were greater than the interest, [1] it was not error for the trial court under these circumstances to include the trust funds as income in the calculation of defendant's child support. We are not requiring that the corpus of a trust be invaded as income, in general, but inclusion was proper under these circumstances where the draws were greater than the interest earned annually on the corpus of the trust and the draws were not treated as loans.

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[1] In addition, with regard to the interest of the trust, regardless of whether defendant's trust is a spendthrift or a trust for support, defendant's interest as a beneficiary can be reached by the child for support. See *Coverston v Kellog*, 136 Mich App 504, 512-513; 357 NW2d 705 (1984) (income from spendthrift trust can be reached to satisfy former wife's claim for support, adopting with approval § 157 of the Restatement of Trusts, and stating "Although a trust is a spendthrift trust of a trust for support, the interest of the beneficiary can be reached by wife or child of beneficiary for support). See also *Evans & Luptak v Obolensky*, 194 Mich App 708, 711-713; 487 NW2d 521 (1992).

In addition, defendant contends the trial court improperly imputed income to him in the calculation of child support, despite the trial court's very explicit denial that it was imputing income in determining defendant's child support obligation. The trial court clearly stated "I am not imputing income, I don't want there to be any lack of clarity in what I am finding." We decline to address this issue as the trial court did not address it, and plaintiff does not argue that it should have in light of the court's consideration of the trust payments. See *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

Defendant further contends the trial court erred in awarding plaintiff attorney fees. Plaintiff, on cross-appeal, asserts the trial court erred in not awarding her the full amount of attorney fees requested. The award of attorney fees by a trial court is reviewed for an abuse of discretion. *Gates v Gates*, 256 Mich App 420, 437-438; 664 NW2d 231 (2003). "An abuse of discretion exists when the result is so palpably and grossly violate of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Schoensee v Bennett*, 228 Mich App 305, 314-315; 577 NW2d 915 (1998).

A statutory basis exists for the award of attorney fees in a divorce action. MCL 552.13(1) states, in relevant part:

> In every action brought, either for a divorce or for a separation, the court may require either party to pay alimony for the suitable maintenance of the adverse party, to pay such sums as shall be deemed proper and necessary to conserve any real or personal property owned by the parties or either of them, and to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency. It may award costs against either party and award execution for the same, or it may direct such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver.

In addition, MCR 3.206(C) permits a party to seek payment of their attorney fees:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action.
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that the party is unable to bear the expense of the action, and that the other party is able to pay.

As such, attorney fees are not recoverable in a divorce proceeding as a matter of right, but may be awarded when necessary to preserve a party's ability to pursue or defend an action. *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001).

In this matter, plaintiff alleged that she incurred $75,000 in attorney fees, but the record is absent any proofs to verify actual fees charged or incurred. Defendant is correct that attorney fees may not be awarded based solely on equitable principles. *In re Adams Estate*, 257 Mich App 230, 237; 667 NW2d 904 (2003), citing *Gove v Gove*, 71 Mich App 431, 436; 248 NW2d 573 (1976). However, the trial court's award of attorney fees was not based in equity. Rather, the amount of attorney fees awarded, when compared to the amount alleged to have been incurred by plaintiff, was deemed to be an equitable figure by the trial court. The trial court's

award of attorney fees was based upon the financial disparity of the parties. Defendant had substantial trust and personal assets to draw upon to finance this litigation. In contrast, plaintiff's only source to pay attorney fees was concomittently her only asset – her income, upon which she was also reliant for her living expenses. It is well settled that a party should not be required to invade assets to satisfy attorney fees when the party is relying upon the same assets for support. *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). Given the financial disparity of the parties, it cannot be said that the trial court's award of attorney fees to plaintiff was an abuse of discretion.

Plaintiff fails to demonstrate her entitlement to full payment of her attorney fees by defendant. The trial court specifically noted it did not consider the parties to have engaged in vexatious litigation – merely immature behavior in requiring all disputes to be resolved by the court. Notably, although defendant has taken exception with the award of attorney fees, he has not specifically challenged the reasonableness of the amount awarded.[2] In determining the amount of attorney fees that might be reasonably awarded, a court should consider:

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [*Wood v Detroit Automobile Inter-Ins Exchange*, 413 Mich 573, 588; 321 NW2d 653 (1982).]

The court is not limited to the factors enumerated, *supra,* when making its determination, and the court is not required to explain its reasoning on each factor. *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 97; 537 NW2d 471 (1995). In the trial court's ruling it is evident that it based the amount awarded to plaintiff primarily upon the total amount incurred. Given that the award of attorney fees was in an amount equal to only one-third of the amount requested, it cannot be deemed to be unreasonable. Based on the trial court's determination that both parties had responsibility for the substantial fees incurred through their inability to communicate and cooperate and that the litigation was not inherently vexatious, plaintiff provides no proof of entitlement to an increased award of fees or error by the trial court in determination of the amount awarded. The trial court did not abuse its discretion.

On cross-appeal, plaintiff contends the trial court erred in its determination that defendant's inheritance was separate property and not subject to invasion or distribution. An appellate court must first review the factual findings of the trial court for clear error regarding property division in a divorce judgment. *Beason v Beason,* 435 Mich 791, 805; 460 NW2d 207 (1990). A finding is clearly erroneous if the appellate court, having reviewed all of the evidence, is left with a definite and firm conviction that a mistake has been made. *Id.* If the findings of the trial court are not clearly erroneous, the appellate court must determine whether the dispositional ruling was fair and equitable under the circumstances. *Sparks v Sparks*, 440 Mich 141, 160; 495

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[2] A party's failure to object to the reasonableness of attorney fees that are awarded in an action for divorce precludes appellate review, absent a demonstration of manifest injustice. *Milligan v Milligan*, 197 Mich App 665, 671; 496 NW2d 394 (1992).

NW2d 893 (1992); *Beason, supra* at 797; *Olson v Olson*, 256 Mich App 619, 622; 671 NW2d 64 (2003), citing *Hanaway v Hanaway*, 208 Mich App 278, 292; 527 NW2d 792 (1995).

MCL 552.1 *et seq.*, controls property distribution in a divorce. A determination of the property rights of the parties must be included in a judgment of divorce. MCR 3.211(B)(3); *Olson, supra* at 627. The goal of the trial court is to achieve a distribution that is fair and equitable under the given circumstances of the case. *McNamara v Horner*, 249 Mich App 177, 188; 642 NW2d 385 (2002). Factors to be considered in the distribution of marital assets include: (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities, (8) past relations and conduct, and (9) general principles of equity. *Perrin v Perrin*, 169 Mich App 18, 22; 425 NW2d 494 (1988). In making any distribution, the court must first distinguish between marital and separate assets. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). Typically, marital assets will be divided, but each party will retain their own separate estate. *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997). Marital assets are defined as those assets that have been acquired or accumulated from the beginning to the end of the marriage. *Bone v Bone*, 148 Mich App 834, 838; 385 NW2d 706 (1986). Separate assets are typically those assets owned by the parties prior to the marriage or received during the marriage without contribution or affirmative action by the other spouse. *Charlton v Charlton*, 397 Mich 84, 90; 243 NW2d 261 (1976).

The separate estate of a spouse is only subject to distribution if one of two statutory exceptions is met. *Reeves, supra* at 494. MCL 552.23(1) permits invasion of a separate asset if:

> [T]he estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party.

To qualify for this exception, a party must demonstrate additional need. *Reeves, supra* at 494. The second statutory exception to noninvasion of separate assets is contained in MCL 552.401, which permits distribution if the other spouse "contributed to the acquisition, improvement, or accumulation of the property." Neither exception applies to the facts of this case.

Plaintiff and defendant do not dispute that the property comprising defendant's trust and real property were premarital assets. Plaintiff contends that she made contributions through provision of certain physical improvements and routine cleaning/maintenance of the marital home in conjunction with her payment of the majority of the routine marital expenses, that led to an appreciation and improvement of the assets. Plaintiff's testimony indicated that these contributions included minimal painting and the replacement of a few light fixtures, along with routine cleaning of the marital home, during the term of her residence, which notably comprised only about thirteen months of the marriage. Defendant paid the taxes and utilities on the property, and completed various larger-scale home improvements. The trial court rejected plaintiff's argument, asserting the parties only dissipated assets and that their lack of financial acumen and irresponsibility led to them "going backwards financially at an alarming rate." In asserting this basis for invasion of defendant's separate assets, plaintiff confuses and fails to differentiate between passive appreciation of an asset's value from active contribution facilitating its growth. Plaintiff's contributions were de minimis, being "indirect and minor in nature," and thus, insufficient to demonstrate plaintiff's contribution to the improvement or

accumulation of the assets sufficient to justify invasion in accordance with the standards of MCL 552.401. *Grotelueschen v Grotelueschen*, 113 Mich App 395, 401; 318 NW2d 227 (1982).[3]

Plaintiff asserts that she is entitled to a distribution of defendant's premarital assets based on need, in accordance with MCL 552.23(1). The trial court rejected plaintiff's request noting the short duration of the marriage, the lack of accumulation of marital property and plaintiff's maintenance of a "good job and a good income." The record fails to demonstrate that plaintiff presented evidence of need for additional support. Rather, plaintiff's argument focused on the overall financial disparity of the parties. Based on plaintiff's failure to demonstrate need, the trial court did not err in rejecting plaintiff's request for invasion of defendant's separate assets. *Davey v Davey*, 106 Mich App 579, 583; 308 NW2d 468 (1981).

Finally, plaintiff seeks defendant's contribution to her appellate attorney fees asserting entitlement based on disparity of the parties' respective financial situations and the vexatious nature of defendant's appeal. The award of attorney fees is discretionary. *Olson, supra* at 634. This Court may award costs and attorney fees, on its own motion or that of a party, as a sanction for a vexatious appeal. MCR 7.216(C)(1); *DeWald v Isola (After Remand)*, 188 Mich App 697, 700; 470 NW2d 505 (1991). If an appeal is initiated for the purpose of hindrance or delay, or in the absence of a reasonable basis for believing the party has a meritorious issue for appeal, or if the party grossly disregards the requirement that issues be fairly presented to the court, it is deemed to be vexatious. *Id.* at 702-703; MCR 7.216(C)(1)(a).

Plaintiff's request for appellate attorney fees is procedurally improper by inclusion of the request as an issue in her brief on cross-appeal rather than as a separate motion. MCR 7.211(C)(8). Specifically, MCR 7.211(C)(8) requires that "[a] party's request for damages or other disciplinary action under MCR 7.216(C) must be contained in a motion filed under this rule. A request that is contained in any other pleading, including a brief filed under MCR 7.212, will not constitute a motion under this rule." In addition, plaintiff has failed to allege sufficient factual allegations to demonstrate that she is unable to bear all or a portion of her expenses, necessitating denial of her request in accordance with MCR 3.206(C) and MCR 7.216(C)(1).

We reverse in part and remand in part to the trial court for further proceedings to address the issue of custody in a manner consistent with this opinion. We affirm the remainder of the judgment of divorce and deny plaintiff's request for appellate attorney fees. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder

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[3] While not applicable to the facts of this case, *Grotelueschen* has been superseded by statute, 10 USC 1408(c)(1), which permits a military retirement to be treated as a distributable marital asset. *King v King*, 149 Mich App 495, 498-499; 386 NW2d 562 (1986).